BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES D. E. TICE Claimant	)	
VS.	)	
HOWE BAKER ENGINEERS Respondent	)	Docket No. 1,035,771
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 17, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. D. Steven Marsh, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant aggravated a preexisting condition while working for respondent and that the aggravation arose out of and in the course of his employment. The ALJ further found that claimant provided timely notice to respondent of his work injury. Accordingly, the ALJ ordered respondent to provide claimant with medical care and to pay claimant temporary total disability benefits at the rate of $510 per week for the period of July 19, 2007, to August 2, 2007. The ALJ also ordered respondent to pay claimant temporary total disability compensation if he is taken off work by the authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 6, 2007, Preliminary Hearing and the exhibits; the transcript of the deposition of Regen Gillis taken September 21, 2007, and the exhibit; the transcript of the deposition of Audrey Ritch taken September 21, 2007; the transcript of the deposition of James Anderson taken September 21, 2007; the transcript of the deposition of Larry M. Carson, Sr., taken September 21, 2007; and the transcript of the deposition of

Isaac Palmer taken September 21, 2007, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant sustained an accidental injury that arose out of and in the course of his employment with respondent and whether claimant provided it with timely notice of his alleged injury pursuant to K.S.A. 44-520.

Claimant alleges that his injury is compensable under the Workers Compensation Act because he suffered an aggravation of a preexisting condition from his July 9, 2007, accident at work. Claimant further alleges that he told his immediate supervisor that he had been injured on July 9, 2007, the day the injury occurred. Claimant further contends that he suffered a series of accidents and injuries through his last day worked, July 18, 2007. Accordingly, claimant argues the ALJ's Order should be affirmed.

The issues for the Board's review are:

(1) Did claimant suffer either an accidental injury or a series of injuries by accidents that arose out of and in the course of his employment with respondent?

(2) Did claimant give respondent timely notice of his alleged accident or accidents?

FINDINGS OF FACT

Claimant began working for respondent on June 25, 2007, as a pipe fitter. He testified that on July 9, 2007, he was on a scaffold installing a 10-inch pipe. As he was performing this task, he felt a slight pull in his back. When claimant came down off the scaffold, his supervisor, Larry Carson, asked him why he was stooped over, and claimant told him he had tweaked his back out. Mr. Carson then asked him if he was ready to go home. Claimant did not ask to fill out an accident report, nor did he ask to be provided medical treatment. Likewise, Mr. Carson did not ask claimant to fill out an accident report, nor did he ask claimant if he needed medical treatment. The next day, July 10, claimant called in sick. He made an appointment with a chiropractor, Dr. Gary Butler, to be seen on Friday, July 13. On July 11, he again called in sick and indicated he would be out the rest of the week.

Claimant saw Dr. Butler on July 13. He reported the work injury to Dr. Butler, and Dr. Butler told him that he could no longer do the work at respondent. Claimant went to respondent on Monday, July 16, at which time he met with Isaac Palmer and James Anderson. He told them he could no longer perform the work as a pipe fitter because of his back condition. He told them that he had hurt his back the week before but admitted he may not have specifically said he was injured at work because he assumed that Mr.

Carson had already talked to them about his accident. He was not asked if his injury was work related. Likewise, he was not asked to and he did not ask either Mr. Anderson or Mr. Palmer about filling out an accident report or being provided medical treatment.

At the July 16 meeting, Mr. Palmer and Mr. Anderson asked claimant whether he would be able to perform work in the welding rod room, and claimant indicated he thought he would be able to do that work. Claimant started in the welding rod room on July 17. He testified that he was doing okay in the morning, but that later in the day he had to rearrange 50-pound boxes of welding rod and was sore by the end of the day. The next day, July 18, he did not do much lifting but just passed out welding rod to the welders. However, by the end of the day he could hardly move. When claimant woke up the next morning, July 19, he was unable to move and he called Regen Gillis, respondent's administrative manager, to let him know what was going on. He told Mr. Gillis that even considering the lack of work in the welding rod room, he could not take standing on the hard floor all day. Claimant asked if he could be laid off but was told that was not possible. Claimant did not return to work, and his last day working at respondent was July 18, 2007.

Claimant admitted he had problems with his back before he started working for respondent and had been seeing a doctor in Missouri as well as Dr. Butler in Wichita. He said he had low back problems due to the heavy lifting he had performed at his various jobs. His back problems started about 18 years ago when he worked for Chris Blaylock Stucco. He did not make a workers compensation claim for that injury but received medical treatment. He had a workers compensation claim while he worked for Blackburn, Inc., 15 to 20 years ago. He does not remember what that injury was. He was only treated for a week and then was released back to work. He also had a workers compensation claim for a low back injury in Missouri while working for a construction company.

Claimant saw Dr. Butler about a month before starting work for respondent because he was having some slight discomfort. And since he was getting ready to start working for respondent, he wanted to be sure he was up to par. Dr. Butler's medical records indicate that claimant complained to Dr. Butler of low back pain, middle back pain, and neck pain. He was walking with an abnormal gait. Claimant related those problems to an incident at home on April 25, 2007, when he was standing on a stool at home reaching over his head.

Claimant was not asked whether he was experiencing any back pain when he started working for respondent. However, claimant said that after seeing Dr. Butler on June 4, 2007, he was "up to par, able to go back to work, capable of bending over, doing my task as it was required."[1] Claimant was apparently able to perform his regular job duties until the incident on July 9, 2007. As of claimant's last day of work, July 18, he was having significant and disabling low back pain. Shortly after he quit working for respondent,

[1] P.H. Trans. at 22.

he noticed pain going down his left leg, which he did not have previous to his injury at respondent.

Mr. Carson, claimant's immediate supervisor, denied seeing claimant come off a scaffold or asking him why he was stooped over. He testified that he would not have sent claimant on a scaffold to work on a 10-inch pipe because claimant had not demonstrated to him that he had the knowledge or ability to do that work. Mr. Carson also denied that claimant ever worked alone and said that everyone works in crews of two or three people. Mr. Carson stated that if claimant had reported a work injury, even a very minor one, he would have sent him to the safety department. Mr. Carson stated that he did not recall claimant ever complaining to him about his back condition.

Audrey Ritch was a pipe fitters helper for respondent. From time to time she worked as claimant's assistant. Claimant talked to her one time about his back problems, telling her that he had hurt his back at another job and that it was giving him problems. He did not relate his back problems to his work at respondent. Ms. Ritch was not working with claimant on July 9. She saw claimant only one time after July 9, either on July 16 or 17, at which time he told her he was getting too old to be doing pipe fitting and that he was being moved to the rod room. At the time of this conversation, Ms. Ritch was working in the safety department. The first time she knew of claimant's claim of being injured at respondent was when a letter was received in the safety department from claimant's attorney on or about July 26, 2007.

Regen Gillis testified that claimant actually worked on July 10, although claimant testified he had called in sick that day. Mr. Gillis said that claimant called in sick on July 11 and 12. On July 16, claimant again telephoned Mr. Gillis and told him he had hurt his back. Mr. Gillis asked if he had injured his back on the job at respondent, and claimant told him that his back problems were ongoing and that he had been seeing a chiropractor. At no time did claimant tell Mr. Gillis that he had been injured while working at respondent. He told Mr. Gillis that he could not do pipe fitting work because it was too hard on his back, and asked for light duty work. Mr. Gillis suggested that claimant meet with Mr. Palmer and Mr. Anderson.

Claimant called in to Mr. Gillis' office on July 19 and said that he could not handle the work in the rod room. A few days after claimant quit his job at respondent, he turned in a doctor's off-work slip at Mr. Gillis' office. Mr. Gillis first became aware that claimant was claiming a work injury after respondent received the letter from claimant's attorney in late July or early August.

Isaac Palmer is the assistant pipe superintendent for respondent, and James Anderson is respondent's pipe superintendent. They both testified that when they met with claimant on July 16, he told them he had a back problem because of an injury on a previous job. He indicated that he could no longer do the work of a pipe fitter. Claimant was given the job in the rod room but only worked there a couple of days. His only task

in the rod room was to inventory rods, and the most he would have had to lift was 10 to 15 pounds. Mr. Palmer indicated that the first he knew that claimant was claiming a workers compensation injury was when he was notified by the safety department that they had received a claim from claimant's attorney.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2]

[2] K.S.A. 2007 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[5] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[6]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the

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[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, Syl. ¶ 1, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 4, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

> notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS AND CONCLUSION

Claimant's low back symptoms worsened after going to work for respondent. Claimant at least temporarily aggravated his preexisting low back condition each and every working day from July 9, 2007, through July 18, 2007. Accordingly, he suffered personal injuries by accidents that arose out of and in the course of his employment with respondent.

Claimant is required to provide notice of accident to his employer within 10 days unless there is just cause to extend the time for giving notice. Respondent admits receiving notice of accident by a letter from claimant's attorney on July 26, 2007.[9] Accordingly, respondent admits it received notice of accident from claimant within 10 days of July 18, 2007, his last date worked. The date of accident for a series is defined in K.S.A. 2007 Supp. 44-508(d) as

> . . . the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in

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[7] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2007 Supp. 44-555c(k).

[9] Respondent's Brief at 1-2 (filed Jan. 15, 2008).

this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

Here, claimant was not treated by an authorized physician, and there is no evidence that claimant was told in writing that his condition was diagnosed as work related, even though this is what claimant said he verbally related to his physician. Accordingly, claimant's date of accident can be no earlier than his last date worked or the date he gave written notice to the respondent of his injury. In either case, notice would have been within 10 days of the date of accident. Therefore, claimant gave respondent timely notice of accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 17, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge